No. 82-1961

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In The

# Supreme Court of the United States

October Term, 1982

EUGENE SCHIAVONI, a/k/a JOE FOMAGE,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOSEPH F. MULCAHY, JR.
JAMES P. McHUGH
*Attorneys for Petitioner*
25 East Fifth Street
Chester, Pennsylvania 19013
(215) 874-7400

7642
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## QUESTIONS PRESENTED

1. Did the District Court improperly refuse to suppress evidence from interceptions of petitioner's oral communications where the petitioner was a principal suspect, where he was named in the application for an extension of a prior order authorizing the interception of his wire communications but where the application failed to list him among those whose oral communications the Government sought to intercept?

2. Did the District Court err in relying on *United States v. Donovan*, 429 U.S. 413 as authority for its refusal to suppress the interceptions of the petitioner's oral communications where the order listed his name among those whose wire communications the Government was authorized to intercept but whose name was not listed among those whose oral communications the Government was authorized to intercept, although the petitioner was a principal subject in the Government's investigaton?

## PARTIES

The parties herein are the United States of America and Eugene Schiavone, a/k/a Joe Fomage.

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No.

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*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

### OPINION BELOW

A copy of the opinion of the United States Court of Appeals for the Third Circuit appears in the Appendix, *infra.*

### JURISDICTION

On March 9, 1983, the United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court convicting the petitioner of the offenses of illegal gambling, aiding

and abetting and conspiracy in violation of 18 U.S.C. §1955; §2; and §371. A petition for rehearing with suggestion for rehearing in banc was denied on March 31, 1983. A copy of the judgment order and the order denying a rehearing are included in the Appendix, *infra*. This Court's jurisdiction is invoked under 28 U.S.C. §1254.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are as follows: United States Constitution, Fourth Amendment; United States Code, Title 18, §§2518(1)(b)(IV); 2518(3); 2518(4)(a); 2518(8)(d); 2518(10)(a)(1).

## STATEMENT OF THE CASE

Petitioner Eugene Schiavoni, a/k/a Joe Fomage, was tried and convicted on charges of illegal gambling, aiding and abetting and conspiracy.

In early 1978, the petitioner and others were suspected of operating an illegal gambling business involving crap games in Morrisville, Pennsylvania, and in Bristol, Pennsylvania, in the Eastern District of Pennsylvania. In order to obtain evidence against the petitioner and the other suspects, the Government applied to a judge of the United States District Court for the Eastern District of Pennsylvania for an order authorizing the interception of wire and oral communications of the petitioner and other named suspects through the use of oral interception devices and video surveillance devices.

An order permitting the requested surveillance was entered on April 25, 1978 for a fifteen day period from that date. Subsequently, on May 19, 1978, the Government submitted an application for an order authorizing the extension of interception of wire and oral communications. The application specifically named the petitioner and other named suspects as persons whose oral and wire communications were sought to be intercepted.

The court, after reviewing the application and accompanying affidavit, issued an order authorizing the interception of the wire communications of the petitioner and the other named suspects and authorizing the interception of the oral communications of the other named suspects but not of the petitioner. The court's order granting the aforesaid extension was issued on May 19, 1978. All of the information gathered concerning the petitioner after that date was through oral interceptions.

The petitioner at his trial, moved to suppress all of the oral interceptions made after May 19, 1978 so far as he was concerned.

The court ruled that that issue was disposed of by the holding in *United States v. Donovan,* 429 U.S. 413 and refused petitioner's motion, saying that the *Donovan* case holds that:

> Even if the Government omits Defendant's name, as under the circumstances of this case, that it does not warrant suppression, and I would conclude that that case disposes of that issue in respect to Mr. McHugh's Motion.

On appeal, the United States Court of Appeals for the Third Circuit, by a panel of three circuit judges, upheld the District Court's refusal to suppress the evidence. Petitioner sought a rehearing before the Third Circuit sitting in banc. On March 31, 1983, petitioner's request for rehearing was denied.

## REASONS FOR GRANTING THE WRIT

**It was error for the court to refuse to suppress oral communications of the petitioner, a principal target of the Government's investigation, on the basis that *United States v. Donovan* permitted the court to issue an order authorizing the interception of petitioner's oral communications without specifying the identity of the petitioner.**

Following the entry of an order on May 19, 1978 authorizing the extension of a prior order authorizing the interception of oral and wire communications, the petitioner moved to suppress all of his oral communications obtained by the Government after that date.

Petitioner contends that pursuant to the Fourth Amendment to the United States Constitution and pursuant to 18 U.S.C. §2518(1)(b)(IV) and 18 U.S.C. §2518(4)(a) he should have been named as a person whose oral communications the Government was authorized to intercept.

The application for an order authorizing the extension of interceptions of wire and oral communications listed the petitioner as one of the persons whose wire communications the Government sought to intercept but did not list the petitioner as one of the persons whose oral communications it sought to intercept.

The court's order authorizing the interception of oral and wire communications listed the petitioner as one concerning whom there was probable cause to believe that information concerning criminal activities would be obtained through the interception of his wire communications. However, the order does not list the petitioner as one whose oral communications would reveal criminal activities which were the subject of the investigation.

Finally, the order of the court authorized the Special Agents of the Federal Bureau of Investigation to intercept the wire communications of the petitioner among other named persons, but did not name the petitioner as being one of those whose oral communications they were authorized to intercept.

18 U.S.C. §2518(1)(b)(IV) requires that:

> An application for an Order authorizing the interception of a wire or oral communication include "the identity of the person, if known, committing the offense and whose communications are to be intercepted".

18 U.S.C. §2518(4)(a) provides that:

> (4) Each Order authorizing or approving the interception of any wire or oral communication shall specify—
>
> (a) The Identity of the person, if known, whose communications are to be intercepted. . . .

It is clear from the application that the Government had knowledge of the petitioner and had probable cause to believe that he was involved in the criminal activity under investigation and, therefore, was obligated under §2518(1)(b)(IV) to specify the identity of the petitioner in its application for the oral intercept. It failed to do so. Moreover, the court, since it was not requested to do so, did not include in its extension order an order to intercept the petitioner's oral communications.

The District Court cited *United States v. Donovan, supra,* for the proposition that under the circumstances of this case it was not necessary to specify the identity of the petitioner in its extension order.

It is respectfully submitted that the *Donovan* case is principally concerned with the question of compliance with 18 U.S.C. §2518(1)(b)(IV) and 18 U.S.C. §2518(8)(d) and whether it is necessary to identify in the application additional persons who are likely to be overheard when their identities are known.

Here, the petitioner is not an additional person but a principal target of the Government.

## CONCLUSION

Since the Government failed to comply with 18 U.S.C. §2518(1)(b)(IV), when it applied for the extension order and since the court failed to comply with 18 U.S.C. §2518(4)(a) when it issued its extension order, the oral communications of the petitioner intercepted after the date of the extension order, May 19, 1978, should be suppressed in accordance with 18 U.S.C. §2518(10)(a)(i) and, therefore, a writ of certiorari should issue to the Court of Appeals for the Third Circuit.

Respectfully submitted,

JOSEPH F. MULCAHY, JR.
JAMES P. McHUGH
*Attorneys for Petitioner*

## APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1634

UNITED STATES OF AMERICA

vs.

SCHIAVONI, EUGENE a/k/a Joe Fomage,

Appellant

(D.C. Crim. No. 82-00141-01)

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until May 7, 1983.

s/ Seitz
Chief Judge

Dated: April 7, 1983

## APPENDIX II

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1634

UNITED STATES OF AMERICA,

v.

EUGENE SCHIAVONI, a/k/a JOE FOMAGE,

Appellant

(Criminal No. 82-00141-01 - E.D.Pa.)

SUR PETITION FOR REHEARING

PRESENT: SEITZ, *Chief Judge,* ADAMS, GIBBONS, HUNTER, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, *District Judges.*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/Seitz
Collins J. Seitz
Chief Judge

DATED: Mar. 31, 1983

## APPENDIX III

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1634

UNITED STATES OF AMERICA

v.

EUGENE SCHIAVONI, a/k/a JOE FOMAGE,

Appellant

(Criminal No. 82-00141-01 - E.D.Pa.)

Submitted Under Third Circuit Rule 12(6)
March 8, 1983

BEFORE: SEITZ, *Chief Judge,* HIGGINBOTHAM and SLOVITER, *Circuit Judges.*

JUDGMENT ORDER

After consideration of the contentions raised by appellant, to-wit, that (1) the district court improperly refused to suppress evidence derived from wire and oral intercepts of the defendant from May 11 to and including May 15, 1978, because the interceptions were not made in conformity with the order of authorization, in that, five day reports for that were not made and (2) the district court improperly refused to suppress evidence derived from oral interceptions of the defendant from May 19, 1978 on because there was no order authorizing such oral interceptions of the defendant, it is

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ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

s/ Seitz
Chief Judge

ATTEST:

s/ Sally Mrvos
Sally Mrvos, Clerk

DATED: Mar. 9, 1983

## APPENDIX IV

Eastern District of Penna.

Docket No. 82-00141-01

**Defendant**

EUGENE SCHIAVONI a/k/a Joe Fomage
Taylorsville Road
Washington Crossing, Pa. 18977

**Counsel**

James P. McHugh, Esq.
25 E. 5th St.
Chester, Pa. 19013

**Finding & Judgment**

Defendant has been convicted as charged of the offense(s) of illegal gambling, aiding and abetting and conspiracy in violation of 18 USC §1955; §2; and §371.

**Sentence or Probation Order**

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS under count 1. In addition under count 1, the defendant shall pay a fine of FIVE THOUSAND ($5,000.00) DOLLARS within THIRTY (30) DAYS

of this date. Under count 2, the defendant is committed to the custody of the Attorney General or his authorized representative for a period of THREE (3) YEARS to run consecutively with the period of imprisonment imposed under count 1.

**Additional Conditions of Probation**

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

**Commitment Recommendation**

The court orders commitment to the custody of the Attorney General and recommends,

2 copies U.S. Marshal
1 copy U.S. Attorney (Strike Force)
1 copy U.S. Probation
1 copy J.P. McHugh, Esq.

s/ Daniel H. Huyett, 3rd
Daniel H. Huyett, 3rd, J
U.S. District Judge
9-13-82

A True Copy Certified
this 15th day of September, 1982.

s/ Francis E. DeVine
Deputy Clerk

## APPENDIX V

### ORDER AUTHORIZING INTERCEPTION OF ORAL AND WIRE COMMUNICATIONS

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MISCELLANEOUS NO. 78-200

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE EXTENSION OF INTERCEPTION OF WIRE AND ORAL COMMUNICATIONS.

### ORDER

### AUTHORIZING INTERCEPTION OF ORAL AND WIRE COMMUNICATIONS

TO: Special Agents of the Federal Bureau of Investigation
United States Department of Justice.

Application under oath having been made before me by EDWARD J. LEVITT, Special Attorney, United States Department of Justice, and an "investigative or law enforcement officer" as defined in Section 2510(7) of Title 18, United States Code, for an Order authorizing interception of oral and wire communications pursuant to Section 2518 of Title 18, United States Code, and full consideration having been given to the matters set forth therein, the Court finds:

(a) there is probable cause to believe that RICHARD BARTOLINI, DOMINICK

*Appendix V*

IAVARONE, CARL SAMUEL IPPOLITO, HENRY J. KUREK, ALFRED J. MANCINI, MICHAEL MANGINI, WALTER MARCHEWSKI, FRANCIS ROSSETTI, JOHN J. SALUTE, EUGENE W. SCHIAVONI, JOHN JAMES SIMONE, THOMAS STRONG, JAMES J. TASSONE and CHARLES F. WARRINGTON and individuals presently known only by the aliases or first names of TOMMY BARNUM, BLUE, BUDDY, CAT, CLEO, GEORGE, JOE A., JOHN, PAT, TRIGGER, AND ZEKE, and others thus far unknown, have committed, are committing, and are about to commit certain offenses enumerated in Section 2516, Title 18, United States Code, as follows: (1) violations of Section 1952, Title 18, United States Code, involving the travelling in interstate commerce and using any facility in interstate commerce, including the mail, with the intent to distribute the proceeds of an illegal gambling operation, and otherwise promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of said gambling operation; (2) violations of Section 1955, Title 18, United States Code, involving the conducting, financing, managing, supervising, directing, and owning all or part of an illegal gambling business which business is in violation of the law of Pennsylvania, namely, Title 18, Purdon's Pennsylvania Statutes Annotated, Sections 5512 and 5514, involves five or more persons who conduct, finance, manage, supervise, direct, and own all or part of such business, and has been and remains in substantially continous operation for a period in excess of thirty

(30) days; (3) violations of Section 2315, Title 18, United States Code, involving the receiving, concealing, storing, bartering, selling, and disposing of any goods, wares, or merchandise, securities, or money of the value of five thousand dollars or more, moving as, which are a part of, and which constitute interstate commerce, knowing the same to have been stolen, unlawfully converted, and taken; (4) violations which are punishable under Section 1963, Title 18, United States Code, namely, offenses involving the conducting and participating, directly and indirectly, in the conduct of the affairs of an enterprise (to wit: the group of above specified known and unknown individuals associated in fact which, in part, operates from the store officially occupied by C. Warren, Incorporated, doing business as C. Warren Check Cashing, Pennsbury Plaza, Phase II Shopping Center, West Trenton Road, Morrisville, Pennsylvania) which is engaged in, or the activities of which affect interstate commerce, through a pattern of racketeering activities (to wit: (1) offenses which are indictable under Title 18, United States Code, Sections 1952, 1955, and 2315, and (2) acts involving gambling which are chargeable under the law of a state, namely, Title 18, Purdon's Pennsyvlania Statutes Annotated, Sections 5512 and 5514, and punishable by imprisonment for more than one (1) year), or through collection of unlawful debt (to wit: a debt incurred or contracted in gambling activity which was in violation of the law of Pennsylvania, namely, Title 18, Purdon's Pennsylvania Statutes Annotated, Sections 5512 and 5514, and the law of the United

States, namely, Title 18, United States code, Section 1955, and incurred in connection with the business of gambling in violation of the law of Pennsylvania, namely, Title 18, Purdon's Pennsylvania Statutes Annotated, Sections 5512 and 5514, and the law of the United States, namely, Title 18, United States Code, Section 1955) in violation of Title 18, United States Code, Section 1962(c), and offenses involving a conspiracy to violate the provisions of Title 18, United States Code, Section 1962(c), in violation of Title 18, United States Code, Section 1962(d); (5) violations of Section 371, Title 18, United States code, involving the conspiring to commit violations of Title 18, United States Code, Sections 1952, 1955 and 2315.

b. there is probable cause to believe that particular oral communications of RICHARD BARTOLINI, DOMINICK IAVARONE, CARL SAMUEL IPPOLITO, HENRY J. KUREK, JOHN J. SALUTE, JOHN JAMES SIMONE, THOMAS STRONG, and CHARLES F. WARRINGTON, and individuals known only by the aliases or first names of CLEO and TRIGGER, and others thus far unknown, concerning these offenses will be obtained through the interception, authorization for which is herewith applied for. In particular, these oral communications will concern: (1) the identities of the individuals from whom money proceeds for the above-described enterprise is collected; the identities of the persons to whom this money is paid; the locations of collection and/or payment of this money; the methods of

collection and/or payment of this money; the identity of persons to whom extensions of credit are made and collected; the amounts loaned; the identity of persons supplying the money to be loaned; the identity of other persons who are assisting the above-named individuals in both the enterprise and making and collecting the extensions of credit; other locations from which the individuals might be operating; (2) the identities of all the persons engaged in the illegal gambling business; all the locations from which the illegal gambling business is conducted; the manner in which the monies derived from the illegal gambling business are collected and/or disbursed; and the bettors; (3) the identities of the persons engaged in the theft of goods from interstate shipment which are received by the participants in the enterprise; the manner in which these goods are delivered to the premises of the enterprise; other locations at which the enterprise may be receiving said stolen goods. In addition, the communications are expected to constitute admissible evidence of the commission of the above-described offenses.

c. there is probable cause to believe that particular wire communications of HENRY J. KUREK, ALFRED J. MANCINI, MICHAEL MANGINI, FRANCIS ROSSETTI, EUGENE W. SCHIAVONI, JOHN JAMES SIMONE, and CHARLES F. WARRINGTON, and individuals presently known only by the aliases or first names of BLUE, BUDDY, CAT, JOHN, and ZEKE, and others thus far unknown, concerning these offenses will be obtained through the interception,

authorization for which is herewith applied for. In particular, these wire communications will concern: (1) the identities of the individuals from whom money proceeds for the above-described enterprise is collected; the identities of the persons to whom this money is paid; the locations of collection and/or payment of this money; the methods of collection and/or payment of this money; the identity of persons to whom extensions of credit are made and collected; the amounts loaned; the identity of persons supplying the money to be loaned; the identity of other persons who are assisting the above-named individuals in both the enterprise and making and collecting the extensions of credit; other locations from which the individuals might be operating; (2) the identities of all the persons engaged in the illegal gambling business; all the locations from which the illegal gambling business is conducted; the manner in which the monies derived from the illegal gambling business are collected and/or disbursed; and the bettors; (3) the identities of the persons engaged in the theft of goods from interstate shipment which are received by the participants in the enterprise; the manner in which these goods are delivered to the premises of the enterprise; other locations at which the enterprise may be receiving said stolen goods. In addition, the communications are expected to constitute admissible evidence of the commission of the above-described offenses.

d. normal investigative procedures reasonably appear to be unlikely to succeed if tried and to be too dangerous.

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e. there is probable cause to believe that the premises known as C. Warren, Incorporated, doing business as C. Warren Check Cashing, at Pennsbury Plaza, Phase II Shopping Center, West Trenton Road, Morrisville, Pennsylvania, and the telephones bearing numbers 215-295-9716, and 215-547-5583 located therein, have been, are being, and will be used by RICHARD BARTOLINI, DOMINICK IAVARONE, CARL SAMUEL IPPOLITO, HENRY J. KUREK, ALFRED J. MANCINI, MICHAEL MANGINI, WALTER MARCHEWSKI, FRANCIS ROSSETTI, JOHN J. SALUTE, EUGENE W. SCHIAVONI, JOHN JAMES SIMONE, THOMAS STRONG, JAMES J. TASSONE, and CHARLES F. WARRINGTON, and individuals presently known only by the aliases or first names of TOMMY BARNUM, BLUE, BUDDY, CAT, CLEO, GEORGE, JOE A., JOHN, PAT, TRIGGER, and ZEKE, and others as yet unknown in connection with the above-described offenses.

WHEREFORE, it is hereby ORDERED that:

Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized, pursuant to Application authorized by the Assistant Attorney General in charge of the Criminal Division, who has been specially designated by the Attorney General of the United States to exercise the power conferred upon him by Section 2516 of Title 18, United States Code;

(1) To intercept oral communications of RICHARD BARTOLINI, DOMINICK IAVARONE, CARL SAMUEL

IPPOLITO, HENRY J. KUREK, JOHN J. SALUTE, JOHN JAMES SIMONE, THOMAS STRONG, and CHARLES F. WARRINGTON, and individuals known only by the aliases or first names of CLEO and TRIGGER, and others as yet unknown concerning the above-described offenses, from the premises known as C. Warren, Incorporated, doing business as C. Warren Check Cashing, at Pennsbury Plaza, Phase II Shopping Center, West Trenton Road, Morrisville, Pennsylvania.

(2) To intercept wire communications of HENRY J. KUREK, ALFRED J. MANCINI, MICHAEL MANGINI, FRANCIS ROSSETTI, EUGENE W. SCHIAVONI, JOHN JAMES SIMONE, and CHARLES F. WARRINGTON, and individuals presently known only by the aliases or first names of BLUE, BUDDY, CAT, JOHN, and ZEKE, and others thus far unknown, over telephones bearing numbers 215-295-9716, and 215-547-5583, which are located in the store officially occupied by C. Warren, Incorporated doing business as C. Warren Check Cashing, at Pennsbury Plaza, Phase II Shopping Center, West Trenton Road, Morrisville, Pennsylvania, concerning the above-described offenses.

(3) Such interception shall not automatically terminate when the type of communication described above in paragraphs (b) and (c) has first been obtained, but shall continue until communications are intercepted which reveal the manner in which RICHARD BARTOLINI, DOMINICK IAVARONE, CARL SAMUEL IPPOLITO, HENRY J. KUREK, ALFRED J. MANCINI, MICHAEL MANGINI, WALTER MARCHEWSKI, FRANCIS ROSSETTI, JOHN J. SALUTE, EUGENE W. SCHIAVONI, JOHN JAMES SIMONE, THOMAS STRONG, JAMES J. TASSONE, and CHARLES F. WARRINGTON, and individuals presently known only by the aliases or first names of TOMMY BARNUM, BLUE, BUDDY, CAT, CLEO, GEORGE, JOE A.,

JOHN, PAT, TRIGGER, and ZEKE, and others as yet unknown participate in the above-described offenses, and which reveal the identities of their confederates, their places and manner of operation and the nature of the conspiracy involved therein, or for a period of twenty (20) days from the date of this Order, whichever is earlier.

IT IS FURTHER ORDERED that Special Agents of the Federal Bureau of Investigation, involved in the actual performance of making the herein authorized interception, monitor and record the type of communications sought to be intercepted only during those times when by visual observation or voice identification, it has been determined in the case of interception of oral communications, that either RICHARD BARTOLINI, DOMINICK IAVARONE, CARL SAMUEL IPPOLITO, HENRY J. KUREK, JOHN J. SALUTE, JOHN JAMES SIMONE, THOMAS STRONG, or CHARLES F. WARRINGTON, or individuals known only by the aliases or first names of CLEO or TRIGGER is actually present inside the said premises, and, in the case of interception of wire communications, it has been determined that either HENRY J. KUREK, ALFRED J. MANCINI, MICHAEL MANGINI, FRANCIS ROSSETTI, EUGENE W. SCHIAVONI, JOHN JAMES SIMONE, and CHARLES F. WARRINGTON, and individuals presently known only by the aliases or first names of BLUE, BUDDY, CAT, JOHN, and ZEKE is actually participating in a telephone conversation occurring on telephone line 215-295-9716, or 215-547-5583.

IT IS FURTHER ORDERED, that Special Agents of the Federal Bureau of Investigation of the Department of Justice are authorized to make one (1) surreptitious entry at any time of day or night into the premises known as C. Warren, Incorporated, doing business as C. Warren Check Cashing, at Pennsbury Plaza,

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Phase II Shopping Center, West Trenton Road, Morrisville, Pennsylvania, for the purpose of removing any oral and wire electronic interception devices utilized pursuant to the authority granted by this order. This removal is to be made as soon as practicable at the end of twenty (20) days from the date of this order. Although it may involve breaking and entering in the night time without the consent of the owner or lawful tenant, the entry shall be made with the minimum intrusion necessary to accomplish the purposes stated herein. No other surreptitious entry into the said premises is authorized without further order of the Court.

IT IS FURTHER ORDERED, upon request of the Applicant, that the Bell Telephone Company of Pennsylvania, a communications common carrier as defined in Section 2510(10) of Title 18, United States Code, shall furnish the applicant forthwith, all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier is according the person whose communications are to be intercepted. The furnishing of such facilities or technical assistance by the Bell Telephone Company of Pennsylvania is to be compensated for by the applicant at the prevailing rates.

PROVIDING THAT EDWARD J. LEVITT shall provide the Court with a written report on or about the fifth, tenth, and fifteenth days following the date of this Order or as often as the Court may require showing what progress has been made toward achievement of the authorized objective and the need for continued interception.

PROVIDING ALSO THAT, this authorization to intercept oral and wire communications shall be executed as soon as practicable after signing this Order and shall be conducted in such

a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18, United States Code, and must terminate upon the attainment of the authorized objective or in any event, at the end of twenty (20) days from the date of this Order.

BY THE COURT:

_____

J.

DATE: May ____, 1978

## APPENDIX VI

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MISCELLANEOUS NO. 78-2004

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE EXTENSION OF INTERCEPTION OF WIRE AND ORAL COMMUNICATIONS.

APPLICATION

EDWARD J. LEVITT, an Attorney of the United States Department of Justice, being duly sworn, states:

1. He is an "investigative or law enforcement officer - of the United States" within the meaning of Section 2510(7) of Title 18, United States Code, that is — an Attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516 of Title 18, United States Code.

2. Pursuant to the authority vested in him by Section 2516 of Title 18, United States Code, the Attorney General of the United States has specifically designated the Assistant Attorney General in charge of the Criminal Division to exercise the power conferred on him by Section 2516 of Title 18, United States Code, to authorize this application. Under the power delegated to him by special designation of the Attorney General, the Assistant Attorney General in charge of the Office of Legal Counsel has authorized this application. Attached to this application as Exhibit A are a copy of the order of the Attorney General specifically designating the Assistant Attorney General in charge of the Office of legal Counsel to act in these matters, and a copy of the memorandum

of authorization of the Assistant Attorney General in charge of the Office of Legal Counsel.

3. This Application seeks authorization to extend and modify the electronic surveillance authorized by this Court on April 25, 1978 (as fully set forth in paragraph 5 herein), as follows:

a. to intercept wire communications of HENRY J. KUREK, ALFRED J. MANCINI, MICHAEL MANGINI, FRANCIS ROSSETTI, EUGENE W. SCHIAVONI, JOHN JAMES SIMONE, and CHARLES F. WARRINGTON, and individuals presently known only by the aliases or first names of BLUE, BUDDY, CAT, JOHN, and ZEKE, and others thus far unknown, over telephones bearing number 215-295-9716, and 215-547-5583, all of which are located in the store officially occupied by C. Warren, Incorporated, doing business as C. Warren Check Cashing, Pennsbury Plaza, Phase II Shopping Center, West Trenton Road, Morrisville, Pennsylvania, to gain evidence of certain offenses enumerated in Section 2516, Title 18, United States Code, which have been, are being, and are about to be committed by the above-listed individuals and others, as more fully set forth in paragraphs 4 and 6, below.

b. to intercept oral communications of RICHARD BARTOLINI, DOMINICK IAVARONE, CARL SAMUEL IPPOLITO, HENRY J. KUREK, JOHN J. SALUTE, JOHN JAMES SIMONE, THOMAS STRONG, and CHARLES F. WARRINGTON, and individuals known only by the aliases or first names of CLEO and TRIGGER, and others thus far unknown, in the store officially occupied by C. Warren, Incorporated, doing business as C. Warren Check Cashing, Pennsbury Plaza, Phase II Shopping Center, West Trenton Road, Morrisville, Pennsylvania, to gain evidence of certain offenses enumerated in Section 2516, Title 18, United States Code, which

have been, are being , and are about to be committed by the above-listed individuals and others, as more fully set forth in paragraphs 4 and 6, below.

4. The offenses enumerated in Section 2516, Title 18, United States Code, as to which evidence is to be gained through the applied for interceptions of wire and oral communications are as follows:

a. violations of Section 1952, Title 18, United States Code, involving the travelling in interstate commerce and using any facility in interstate commerce, including the mail, with the intent to distribute the proceeds of an illegal gambling operation, and otherwise promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of said gambling operation.

b. violations of Section 1955, Title 18, United States Code, involving the conducting, financing, managing, supervising, directing, and owning all or part of an illegal gambling business which business is in violation of the law of Pennsylvania, namely, Title 18, Purdon's Pennsylvania Statutes Annotated, Sections 5512 and 5514, involves five or more persons who conduct, finance, manage, supervise, direct, and own all or part of such business, and has been and remains in substantially continuous operation for a period in excess of thirty (30) days.

c. violations of Section 2315, Title 18, United States Code, involving the receiving, concealing, storing, bartering, selling, and disposing of any goods, wares, or merchandise, securities, or money of the value of five thousand dollars or more, moving as, which are a part of, and which constitute interstate commerce, knowing the same to have been stolen, unlawfully converted, and taken.

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d. violations which are punishable under Section 1963, Title 18, United States Code, namely, offenses involving the conducting and participating, directly and indirectly, in the conduct of the affairs of an enterprise (to wit: the group of above specified known and unknown individuals associated in fact which, in part, operates from the store officially occupied by C. Warren, Incorporated, doing business as C. Warren Check Cashing, Pennsbury Plaza, Phase II Shopping Center, West Trenton Road, Morrisville, Pennsylvania) which is engaged in, or the activities of which affect interstate commerce, through a pattern of racketeering activities (to wit: (1) offenses which are indictable under Title 18, United States Code, Sections 1952, 1955, and 2315, and (2) acts involving gambling which are chargeable under the law of a state, namely, Title 18, Purdon's Pennsylvania Statutes Annotated, Sections 5512 and 5514, and punishable by imprisonment for more than one (1) year), or through collection of unlawful debt (to wit: a debt incurred or contracted in gambling activity which was in violation of the law of Pennsylvania, namely, Title 18, Purdon's Pennsylvania Statutes Annotated, Sections 5512 and 5514 and the law of the United States, namely, Title 18, United States Code, Section 1955, and incurred in connection with the business of gambling in violation of the law of Pennsylvania, namely, Title 18, Purdon's Pennsylvania Statutes Annotated, Sections 5512 and 5514, and the law of the United States, namely, Title 18, United States Code, Section 1955) in violation of Title 18, United States Code, Section 1962(c), and offenses involving a conspiracy to violate the provisions of Title 18, United States Code, Section 1962(c), in violation of Title 18, United States Code, Section 1962(d).

e. violations of Section 371, Title 18, United States Code, involving the conspiring to commit violations of Title 18, United States Code, Sections 1952, 1955, and 2315.

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5. On April 25, 1978, pursuant to application by the Government, Honorable CLARENCE C. NEWCOMER, Judge, United States District Court for the Eastern District of Pennsylvania, authorized the conducting for a twenty-day period of certain electronic surveillance, as follows:

a. interception of wire communications of CARL SAMUEL IPPOLITO, JOHN JAMES SIMONE, CHARLES F. WARRINGTON, and EUGENE W. SCHIAVONI, and others thus far unknown, over telephones bearing numbers 215-295-9716, 215-295-9893, and 215-547-5583, all of which are located in the store officially occupied by C. Warren, Incorporated, doing business as C. Warren Check Cashing, Pennsbury Plaza, Phase II Shopping Center, West Trenton Road, Morrisville, Pennsylvania, to gain evidence of certain offenses enumerated in Section 2516, Title 18, United States Code, which had been, were being, and were about to be committed by the above-listed individuals.

b. interception of oral communications of CARL SAMUEL IPPOLITIO, JOHN JAMES SIMONE, CHARLES F. WARRINGTON, EUGENE W. SCHIAVONI, DOMINICK IAVARONE, ALBERT MICHAEL CAMPO, THOMAS STRONG, and HENRY J. KUREK, and others thus far unknown, in the store officially occupied by C. Warren, Incorporated, doing business as C. Warren Check Cashing, Pennsbury Plaza, Phase II Shopping Center, West Trenton Road, Morrisville, Pennsylvania, to gain evidence of certain offenses enumerated in Section 2516, Title 18, United States Code, which had been, were being, and were about to be committed by the above-listed individuals.

6. He has discussed all the circumstances of the above offenses with Special Agent MARTIN BILDER of the

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Philadelphia Office of the Federal Bureau of Investigation, who has directed and conducted the investigation herein, and has examined the affidavit of Special Agent BILDER (attached to this application as Exhibit B, and incorporated by reference herein) which alleges the facts therein in order to show that:

a. there is probable cause to believe that RICHARD BARTOLINI, DOMINICK IAVARONE, CARL SAMUEL IPPOLITO, HENRY J. KUREK, ALFRED J. MANCINI, MICHAEL MANGINI, WALTER MARCHEWSKI, FRANCIS ROSSETTI, JOHN J. SALURE, EUGENE W. SCHIAVONI, JOHN JAMES SIMONE, THOMAS STRONG, JAMES J. TASSONE, and CHARLES F. WARRINGTON and individuals presently known only by the aliases or first names of TOMMY BARNUM, BLUE, BUDDY, CAT, CLEO, GEORGE, JOE A., JOHN, PAT, TRIGGER, and ZEKE, and others thus far unknown, have committed, are committing, and are about to commit certain offenses enumerated in Section 2516, Title 18, United States Code, namely, violations of Title 18, United States Code, Sections 1952, 1955, 1962(c) and (d) (punishable under Section 1963), 2315 and 371.

b. there is probable cause to believe that the store officially occupied by C. Warren, Incorporated, doing business as C. Warren Check Cashing, at Pennsbury Plaza, Phase II Shopping Center, West Trenton Road, Morrisville, Pennsylvania, is being used and is about to be used in connection with the commission of the offenses enumerated in subparagraph (a) of this paragraph and are commonly used by RICHARD BARTOLINI, DOMINICK IAVARONE, CARL SAMUEL IPPOLITO, HENRY J. KUREK, JOHN J. SALUTE, JOHN JAMES SIMONE, THOMAS STRONG and CHARLES F. WARRINGTON and individuals known only by the aliases or first names of CLEO and TRIGGER and others thus far unknown

and that particular communications concerning said offenses will be obtained through the interception of oral communications by said persons at said location.

c. there is probable cause to believe that the telephones bearing numbers 215-295-9716 and 215-547-5583 which are located in the store officially occupied by C. Warren, Incorporated, doing business as C. Warren Check Cashing, at Pennsbury Plaza, Phase II Shopping Center, West Trenton Road, Morrisville, Pennsylvania, are being used and are about to be used in connection with the commission of the offenses enumerated in sub-paragraph (a) of this paragraph and are commonly used by HENRY J. KUREK, ALFRED J. MANCINI, MICHAEL MANGINI, FRANCIS ROSSETTI, EUGENE W. SCHIAVONI, JOHN JAMES SIMONE, and CHARLES F. WARRINGTON, and individuals presently known only by the aliases or first names of BLUE, BUDDY, CAT, JOHN, and ZEKE, and others thus far unknown, and that particular communications concerning said offenses will be obtained through the interception of wire communications by said persons on said telephones.

d. the attached affidavit contains a full and complete statement explaining why normal investigative procedures either have been tried and have failed or reasonably appear unlikely to succeed if continued or reasonably appear unlikely to succeed if tried or to be too dangerous.

e. there is probable cause to believe that the particular oral and wire communications sought to be intercepted will concern: (1) the identities of the individuals from whom money proceeds for the above-described enterprise is collected; the identities of the persons to whom this money is paid; the locations of collection and/or payment of this money; the methods of

collection and and/or payment of this money; the identity of persons to whom extensions of credit are made and collected; the amounts loaned; the identity of persons supplying the money to be loaned; the identity of other persons who are assisting the above-named individuals in both the enterprise and making and collecting the extensions of credit; other locations from which the individuals might be operating; (2) the identities of all the persons engaged in the illegal gambling business; all the locations from which the illegal gambling business is conducted; the manner in which the monies derived from the illegal gambling business are collected and/or disbursed; and the bettors; (3) the identities of the persons engaged in the theft of goods from interstate shipment which are received by the participants in the enterprise; the manner in which these goods are delivered to the premises of the enterprise; other locations at which the enterprise may be receiving said stolen goods. In addition, the communications are expected to constitute admissible evidence of the commission of the above-described offenses.

f. no previous applications have been made to intercept oral communications of any persons at the premises officially occupied by the "check cashing agency" or over telephone facilities as to which authorization to intercept wire communications is herein sought except as specified in paragraph 5 above. To the knowledge of the affiant, of the persons whose communications are herein sought to be electronically intercepted, applications for the interception of only two (2) such persons have been previously made, as follows:

(1) previous application was made before Honorable CLARENCE C. NEWCOMER, United States District Judge, Eastern District of Pennsylvania, on March 4, 1976, requesting authorization to intercept oral communications of CARL SAMUEL IPPOLITO. On March 25, 1976, on application of

the Government, Judge NEWCOMER authorized a ten-day extension of the order authorizing the interception of said oral communications. On April 9, 1976, on application of the Government, Judge NEWCOMER authorized an additional twenty (20) day extension of the order authorizing the interception of said oral communications.

(2) previous application was made before Honorable DONALD W. VAN ARTSDALEN, United States District Judge, Eastern District of Pennsylvania, on December 14, 1973, requesting authorization to intercept wire communications of EUGENE W. SCHIAVONI. This interception began on December 14, 1973, and was terminated on December 19, 1973.

WHEREFORE, your affiant believes that probable cause exists to believe that RICHARD BARTOLINI, DOMINICK IAVARONE, CARL SAMUEL IPPOLITO, HENRY J. KUREK, ALFRED J. MANCINI, MICHAEL MANGINI, WALTER MARCHEWSKI, FRANCIS ROSSETTI, JOHN J. SALUTE, EUGENE W. SCHIAVONI, JOHN JAMES SIMONE, THOMAS STRONG, JAMES J. TASSONE and CHARLES F. WARRINGTON, and individuals presently known only by the aliases or first names of TOMMY BARNUM, BLUE, BUDDY, CAT, CLEO, GEORGE, JOE A., JOHN, PAT, TRIGGER, and ZEKE, and others as yet unknown, are engaged in the commission of the offenses described in paragraph 6(a), supra; that RICHARD BARTOLINI, DOMINICK IAVARONE, CARL SAMUEL IPPOLITO, HENRY J. KUREK, JOHN J. SALUTE, JOHN JAMES SIMONE, THOMAS STRONG, and CHARLES F. WARRINGTON, and individuals known only by the aliases or first names of CLEO and TRIGGER, and others as yet unknown, have used, are using, and are about to use the premises known as C. Warren, Incorporated, doing business as C. Warren Check Cashing, Pennsbury Plaza, Phase II Shopping Center, West

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Trenton Road, Morrisville, Pennsylvania, in connection with commission of the above-described offenses and that oral communications of RICHARD BARTOLINI, DOMINICK IAVARONE, CARL SAMUEL IPPOLITO, HENRY J. KUREK, JOHN J. SALUTE, JOHN JAMES SIMONE, THOMAS STRONG and CHARLES F. WARRINGTON, and individuals known only by the aliases or first names of CLEO and TRIGGER, and others as yet unknown concerning these offenses will be intercepted at the above-described premises; that HENRY J. KUREK, ALFRED J. MANCINI, MICHAEL MANGINI, FRANCIS ROSSETTI, EUGENE W. SCHIAVONI, JOHN JAMES SIMONE, and CHARLES F. WARRINGTON, and individuals presently known only by the aliases or first names of BLUE, BUDDY, CAT, JOHN, and ZEKE, and others as yet unknown have used, are using, and are about to use telephones bearing numbers 215-295,9716, and 215-547-5583, located at said premises in connection with commission of the above-described offenses and that wire communications of HENRY J. KUREK, ALFRED J. MANCINI, MICHAEL MANGINI, FRANCIS ROSSETTI, EUGENE W. SCHIAVONI, JOHN JAMES SIMONE, and CHARLES F. WARRINGTON, and individuals presently known only by the aliases or first names of BLUE, BUDDY, CAT, JOHN, and ZEKE, and others as yet unknown concerning these offenses will be intercepted on the above-described telephone facilities and that normal investigative procedures reasonably appear to be unlikely to succeed if tried and to be too dangerous.

On the basis of the allegations contained in this application and on the basis of the affidavit of Special Agent MARTIN BILDER, attached hereto, and made a part hereof, affiant requests this Court to issue an Order, pursuant to the power conferred on it by Section 2518 of Title 18, United States Code, authorizing

the Federal Bureau of Investigation of the United States Department of Justice to intercept oral communications at the above-described premises and wire communications on the above-described telephone facilities until communications are intercepted which reveal the manner in which RICHARD BARTOLINI, DOMINICK IAVARONE, CARL SAMUEL IPPOLITO, HENRY J. KUREK, ALFRED J. MANCINI, MICHAEL MANGINI, WALTER MARCHEWSKI, FRANCIS ROSSETTI, JOHN J. SALUTE, EUGENE W. SCHIAVONI, JOHN JAMES SIMONE, THOMAS STRONG, JAMES J. TASSONE, and CHARLES F. WARRINGTON, and individuals presently known only by the aliases or first names of TOMMY BARNUM, BLUE, BUDDY, CAT, CLEO, GEORGE, JOE A., JOHN, PAT, TRIGGER, and ZEKE, and others as yet unknown participate in the commission of the above-described offenses, which reveal the identities of their confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of twenty (20) days from the date of that Order, whichever is earlier.

It is further requested that Special Agents of the Federal Bureau of Investigation be authorized to enter the above-described premises surreptitiously at the termination of the surveillance for the purposes of removing equipment, disconnecting transmissions from the premises to an off-premises location, and removing any electronic oral or wire interception device or visual surveillance device utilized pursuant to the authority granted by this authorization and order. In this regard, the Court's attention is directed to the recent case, *United States v. Ford,* 553 F2d 146 (D.C. Cir. 1977). Applicant submits that the Court's opinion in *Ford, supra,* is overbroad and incorrect as a matter of law. In addition, it is noted that the United States Court of Appeals for the Third Circuit has not yet ruled on the precise issue therein (i.e., the sufficiency of a court order authorizing surreptitious entry pursuant to a court authorized electronic surveillance.)

However, out of an abundance of caution, certain language limiting the surreptitious entries has been inserted into the order which is consistent with the holding in *Ford, supra* (although it is submitted that said language is not required as a matter of law). This language is in recognition of the fact that, in order to effectuate the investigation derived from the electronic interception herein applied for, it will be necessary to surreptitiously break and enter in the day and night time, the above-described premises. The attached affidavit contains a full explanation of the details.

It is further requested that this Court issue an Order pursuant to Section 2518(4)(e) of Title 18, United States Code, directing that the Bell Telephone Company of Pennsylvania, a communications common carrier as defined in Section 2510(10) of Title 18, United States Code, shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier is according the person whose communications are to be intercepted, the furnishing of such facilities or technical assistance by the Bell Telephone Company of Pennsylvania, to be compensated for by the applicant at the prevailing rates.

_____

EDWARD J. LEVITT
Special Attorney
United States Department
of Justice

Subscribed to and sworn to before
me this _____ day of May, 1978.

_____

UNITED STATES DISTRICT JUDGE

Office Supreme Court, U.S.
FILED
SEP 16 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1961

# In the Supreme Court of the United States

OCTOBER TERM, 1983

EUGENE SCHIAVONI, aka JOE FOMAGE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that omission of his name in an application and order for electronic surveillance required suppression of his statements intercepted during surveillance.

1. Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955, and conspiring to commit that offense, in violation of 18 U.S.C. 371. The indictment charged, and the evidence showed, that petitioner was involved in the operation of crap games in the Eastern District of Pennsylvania over an extended period in 1978, and that he conspired with at least six other persons to conduct the games during that time. The case against petitioner was based in large measure on a number of tape-recorded conversations intercepted pursuant to court orders between April and June of 1978. Petitioner was sentenced

to a total term of eight years' imprisonment and a $5,000 fine (Pet. App. 5a-6a). The court of appeals affirmed (Pet. App. 3a-4a).

2. In the initial order authorizing electronic surveillance in this case, petitioner was listed among the persons whose oral and wire communications could be intercepted. C.A. App. 55a, 56a.[1] In addition, petitioner was listed among those who could properly be subjected to video surveillance at the location where the oral and wire interceptions were being conducted. C.A. App. 76a. In the applications for renewed electronic surveillance, the government submitted that there was probable cause to believe that petitioner was involved in the subject offenses, and that there was probable cause to believe that his *wire* communications would reveal evidence of these offenses. C.A. App. 90a. However, the government did not list petitioner as being among those whose *oral* communications were expected to reveal evidence of the offenses in question. *Ibid.* Accordingly, in the extension order, the district court authorized the interception of petitioner's wire communications and the use of video surveillance directed at petitioner (C.A. App. 105a-106a, 128a), but it did not include him in the oral communications portion of the order (C.A. App. 105a).[2]

In the course of the interceptions conducted under the renewal order, petitioner was overheard in both wire and oral communications. However, on each occasion on which petitioner's oral communications were overheard, he was speaking with a person who was named in the oral communications portion of the order. C.A. App. 160a, 184a-185a.

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[1]"Oral communications" means face to face conversations; "wire communications" means phone conversations (C.A. App. 164a).

[2]Several other persons were similarly identified in the wire, but not the oral, communications sections of the renewal application and order.

3. Petitioner does not contend that the interceptions in which he was overheard violated the surveillance order. Rather, his contention (Pet. 5) is that the government knew his oral communications were likely to be intercepted and that he therefore should have been named in that portion of the interception application and order. This claim is wholly insubstantial for two reasons.

a. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, requires that a surveillance application identify an individual if the government has probable cause to believe (1) that the individual is engaged in the criminal activity under investigation and (2) that the individual's conversations will be intercepted by the proposed electronic surveillance (18 U.S.C. 2518(1)(b)(iv)). *United States* v. *Donovan*, 429 U.S. 413, 423-428 (1977); *United States* v. *Kahn*, 415 U.S. 143 (1974). The statute further requires that under those circumstances, the court's interception order must also identify the individual (18 U.S.C. 2518(4)(a)). But if the government does not have probable cause to believe that the individual's conversations will be intercepted by the particular form of electronic surveillance that is being requested, the government is not required to name the individual in that part of the application. Cf. *United States* v. *Kahn*, 415 U.S. 143, 155 (1974). Likewise, the district court's order authorizing electronic surveillance need not name any individual if there is not probable cause to believe that his conversations will be intercepted by the particular form of surveillance under consideration.

Petitioner does not contend that the government had probable cause to believe that his face to face conversations relating to the subject offenses would be intercepted in the location for which the oral interception order was requested. He merely asserts (Pet. 6) that he was a target of the investigation and that his name was known to the government at

the time of the application in question. But that is clearly not enough to require naming him in the application or the order, or even to justify doing so; there must be probable cause to believe that his criminal communications will be overheard in the course of the particular surveillance at issue. Petitioner has failed to demonstrate that the government had that probable cause, yet nonetheless intentionally omitted his name from that portion of the surveillance application.[3]

The far more reasonable conclusion is that the government drafted its application cautiously — that it asserted that there was probable cause to believe petitioner's telephone conversations would be intercepted, but not his oral communications — for the simple reason that the government did not think that it had probable cause on the latter score.[4] If the government had had probable cause to believe petitioner's oral as well as wire communications would be intercepted, it would have had nothing to gain from including petitioner's name in the wire communication portion of the application, but omitting it from the oral communication portion. The fact that petitioner's oral communications were intercepted — in the course of his conversations with persons as to whom there was probable cause — is not sufficient to establish, retroactively, that the government should have expected to overhear petitioner in face to face communications at the surveillance site.

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[3]The fact that other targets were similarly treated makes it unlikely that the omission was an oversight.

[4]At the suppression hearing, the government attorney indicated that he did not know why petitioner was not identified in the oral communication portion of the application (C.A. App. 159a). When he attempted to obtain that information for the record from the FBI agent who supervised the surveillance (C.A. App. 163a-164a), petitioner's counsel objected (C.A. App. 186a), and the district court indicated that it was not interested in further testimony on the matter (*ibid.*; cf. C.A. App. 160a).

b. Even if the government did have probable cause to believe that petitioner's oral communciations would be intercepted, the failure to mention his name in the application or the order does not justify suppressing the evidence obtained under the authority of the order. *United States* v. *Donovan, supra*, 429 U.S. at 435-437. Petitioner apparently seeks (Pet. 6) to distinguish *Donovan* on the ground that that case focused on the contents of the interception application (18 U.S.C. 2518(1)(b)(iv)) and the inventory (18 U.S.C. 2518(8)(d)), rather than the contents of the interception order (18 U.S.C. 2518(4)). This distinction, however, is totally without force. The *Donovan* case, like this one, involved the question of what must appear in *both* an application and an order. See 429 U.S. at 435 ("the failure to identify additional persons who are likely to be overheard engaging in incriminating conversations could hardly invalidate an otherwise lawful judicial authorization"); *id.* at 436-437 n.24. The Court focused on the application simply because, as the instant case demonstrates, if the application does not mention a particular individual, neither will the order. Therefore, if the failure to name a particular subject in the application cannot justify suppression, neither can the failure to name him in the order.[5]

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[5]Nor is there any merit to petitioner's suggestion (Pet. 6) that Title III provides more stringent identification requirements for surveillance subjects who are allegedly "principal targets" of the government's investigation. In the absence of probable cause to believe that an individual's incriminatory conversations will be intercepted, that individual need not be named in the surveillance application or authorization regardless of his status in the investigation. Cf. *United States* v. *Donovan, supra*, 429 U.S. at 423-428.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

SEPTEMBER 1983

DOJ-1983-09